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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Petitioner*,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

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Date: October 18, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether a commuter authority covered by the Northeast Rail Service Act of 1981 is subject to the labor transfer provisions of said Act when it contracts for the sale of commutation tickets which are specifically mentioned in the statutory definition of "commuter service" in said Act.

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RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Petitioner*,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

The petitioner, Railway Labor Executives' Association ("RLEA"), respectfully prays that a writ of certiorari issue to review the judgment of the Special Court, Regional Rail Reorganization Act of 1973 entered in this case on September 28, 1982.

OPINION BELOW

The opinion of the Special Court, not yet reported, appears in the Appendix (hereinafter designated "App.") at 1a-15a.

JURISDICTION

The judgment of the Special Court was entered on September 28, 1982, (App. 16a). This petition is governed

by § 1152(b) of the Northeast Rail Service Act of 1981, which provides that judgment of the Special Court shall be reviewable only upon petition for a writ of certiorari to this Court to be filed not more than twenty (20) days after the entry of an order of the Special Court (App. 24a).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Northeast Rail Service Act of 1981 ("NERSA"), including pertinent amendments to the Rail Passenger Service Act ("RPSA") and the Regional Rail Reorganization Act of 1973 ("3R Act") are set forth in the Appendix at pp. 20a-23a.

STATEMENT

Proceedings Below

This case arose out of the announced intention of the Southeastern Pennsylvania Transportation Authority ("SEPTA") to take over the ticket selling function from the Consolidated Rail Corporation ("Conrail") in providing rail commuter service in the Philadelphia area without complying with the labor transfer provisions of NERSA. SEPTA is a "commuter authority" as defined in § 1135 of NERSA, amending § 102 of the 3R Act, 95 Stat. 646. SEPTA is a corporation organized under the Pennsylvania Urban Mass Transportation Law, Act of January 22, 1968, P.L. 42, No. 8, as amended by the Act of July 10, 1980, P.L. 427, No. 101, 55 P.S. § 600.101, *et seq.* SEPTA is one of the "commuter authorities" expressly mentioned in the definition section of NERSA, § 1135. *RLEA* v. *SEPTA*, 534 F. Supp. 832, 834 (Sp. Ct. RRRA), *cert. denied*, ____ U.S. ____, 73 L.Ed.2d 1285, 102 S. Ct. 2271 (1982) ("*SEPTA I* ").

The RLEA is an unincorporated association comprised of the chief executive officers of virtually all the standard

national and international railway labor unions in the United States, including those having collective-bargaining agreements with Conrail, which were negotiated in accordance with the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the 3R Act, 45 U.S.C. § 771, *et seq. SEPTA I*, 534 F. Supp. at 834.

The RLEA filed this action in the Special Court for a declaratory judgment and preliminary and permanent injunctive relief that would prevent SEPTA from taking over from Conrail the ticket selling function for rail commuter service provided in the Philadelphia area without complying with the labor transfer provisions of NERSA (§§ 508 and 510 of the RPSA), which require implementing agreements and collective-bargaining agreements with representatives of Conrail employees prior to operation of commuter service (App. 4a-7a). The particular act which RLEA complained of was SEPTA's announced intention to assume performing through a contractor the ticket selling functions being provided by Conrail and Conrail employees represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes ("BRAC"), a constituent member of the RLEA (App. at 3a).

The complaint alleged that the selling of tickets constituted "commuter service" as defined in § 1135 of NERSA, and prayed for a declaration that SEPTA must negotiate and arbitrate, if necessary, an implementing agreement with Conrail and BRAC and negotiate a collective-bargaining agreement with BRAC prior to assuming that function pursuant to §§ 508 and 510 of the Rail Passenger Service Act ("RPSA"), as amended by § 1145 of NERSA (App. at 4a). RLEA also sought an injunction prohibiting SEPTA from contracting out the ticket selling function without first complying with the

labor transfer provisions of NERSA contained in § 1145 of that Act.

The Special Court heard this matter on RLEA's Motion for a Preliminary Injunction filed on June 15, 1982 (App. 7a) based upon the stipulated facts filed June 28, 1982, and an evidentiary hearing held July 1, 1982 (App. 7a-8a). At oral argument on July 16, 1982, the Special Court informed the parties that in accordance with Rule 65(a)(1) Fed. R. Civ. P., the trial on the merits would be advanced and consolidated with the hearing on the Motion for Preliminary Injunction (App. 8a). The Special Court in a judgment dated September 28, 1982, denied RLEA's Motion for Preliminary Injunction and dismissed the complaint on its merits (App. 16a), holding that the transfer of the ticket selling function from Conrail to SEPTA was routine and minor, and although involving a larger number of positions, was not substantially dissimilar to the assumption by SEPTA of janitorial, grass cutting, and police functions assumed by SEPTA and held not to be subject to the labor transfer provisions of NERSA in *RLEA* v. *SEPTA*, 534 F. Supp. 852 (Sp. Ct. RRRA 198 ("*SEPTA II* ") and *International Brotherhood of Teamsters* v. *SEPTA*, 539 F. Supp. 1222 (Sp. Ct. RRRA 1982) ("*SEPTA III* "). The Special Court did not specifically deal with RLEA's lead argument that the sale of tickets was specifically mentioned in NERSA's statutory definition of "commuter service" making earlier precedent inapplicable (App. 23a).

Facts

Before April 1, 1976, SEPTA subsidized rail commuter service on thirteen (13) lines radiating from center city, Philadelphia operated by the Reading and Penn Central Railroads, and later by their reorganization trustees,

serving the five (5) southeastern Pennsylvania Counties of Bucks, Chester, Delaware, Montgomery, and Philadelphia. After the transfer of those rail properties to Conrail on April 1, 1976, Conrail continued to operate the commuter service formerly furnished by those transferor railroads and their trustees and received subsidy payments from SEPTA pursuant to § 304(e) of the 3R Act. *SEPTA I*, 534 F. Supp. at 834.

After the passage of NERSA, SEPTA announced its intention to operate virtually all the commuter services then operated by Conrail out of the Reading Terminal in Philadelphia on its own without complying with the labor transfer provisions of NERSA, commencing with a rail diesel car line known as the Fox Chase-Newtown Branch. *SEPTA I*, 534 F. Supp. at 835. RLEA brought *SEPTA I* to the Special Court to enjoin SEPTA from accomplishing this proposed takeover. On January 27, 1982, the Special Court issued its opinion in *SEPTA I*, holding that any rail commuter service operated by Conrail on the effective date of NERSA (August 13, 1981) was subject to the labor transfer provisions of NERSA if a commuter authority intended to operate the service on its own behalf. SEPTA petitioned this Court for a writ of certiorari to review the decision of the Special Court in *SEPTA I*, which was denied May 24, 1982 ___ U.S. ___, 73 L.Ed.2d 1285, 102 S. Ct. 2271 (1982).

SEPTA then announced its intention to assume janitorial and grass cutting functions performed by Conrail employees without complying with the labor transfer provisions of NERSA. *SEPTA II*, 534 F. Supp. at 853. In an opinion dated March 11, 1982, the Special Court permitted SEPTA to go forward with its plan since in the Court's view, janitorial and grass cutting services were not intended to be covered by the labor transfer provi-

sions of NERSA, but holding in essence that SEPTA could not contract out "commuter service" being performed by Conrail on the effective date of NERSA without first complying with the labor transfer provisions of NERSA. *SEPTA II*, 534 F. Supp. at 857.

SEPTA next announced its intention to itself assume police functions previously performed by employees of Conrail without complying with the labor transfer provisions of NERSA. The Special Court in an opinion dated May 21, 1982, permitted SEPTA's action on essentially the same ground as *SEPTA II*. *SEPTA III*, 539 F. Supp. 1222.

SEPTA then announced its intention to contract out the ticket selling function, first on the side of the former Reading Railroad without complying with the labor transfer provisions of NERSA. The Special Court, applying the standard set forth in *SEPTA II* and *SEPTA III*, determined that the sale of tickets was not intended to be covered by the labor transfer provisions of NERSA (App. at 23a), even though the Court found that all of the criteria set forth in *SEPTA II* had not been met by SEPTA in the case at bar, specifically, that Conrail had never consented prior to NERSA to the transfer of such function (App. 12a) and that the ticket selling involved a substantially larger number of employees (132) than janitorial, grass cutting (32), or police functions (14) (App. 14a). The Court did not address the issue raised by RLEA that the specific mention of the sale of commutation tickets and NERSA's definition of "commuter service" precluded any application of the *SEPTA II* criteria.

REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with a long line of decisions of this Court which hold that in all cases involv-

ing statutory construction, the starting point must be the language employed by the Congress. *See, American Tobacco Co.* v. *Patterson*, ___ U.S. ___, 71 L.Ed.2d 748, 755 (1982); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). It also conflicts with this Court's view that legislative purpose is expressed by the ordinary meaning of words used in a statute, and that the language used is ordinarily conclusive. *Consumer Products Safety Commission* v. *G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Richards* v. *United States*, 369 U.S. 1, 9 (1962). What the Court below did in the case at bar was to sit as a super-legislature and create statutory distinctions where none were obviously intended by the explicit language of the definitional portion of the stature, which is clearly contrary to past holdings of this Court. *American Tobacco Co.* v. *Patterson, supra*, 71 L.Ed.2d at 757, n.6; *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965).

The issue presented is of major importance since the smooth transition from Conrail to the commuter authorities explicitly envisioned by the Congress in NERSA hangs in the balance. The importance of the issue in the case at bar extends far beyond the Special Court's violation of the cardinal rule of statutory construction that statutes plain on their face mean exactly what they say, to the ability of the Congress to be free within the bounds of the Constitution to legislate toward such ends as it chooses without interference from the Judiciary, particularly given the intensive federal concern with railroads in general. *See, U.S. Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980). These considerations warrant review by this Court.

1. The general panel of the Special Court in *SEPTA I*, made it crystal clear that if a commuter authority intended to operate "commuter service," it was bound by

the labor transfer provisions of NERSA, holding that any other result based upon the language of the statute would substantially thwart the expressed Congressional will and the Government's interest in minimizing future costs for Conrail and itself and in seeking to preserve labor peace and employee morale. *SEPTA I*, *supra*, 534 F. Supp. at 851. When the General Panel[1] was faced with the argument from SEPTA in *SEPTA II* that the limitations of *SEPTA I* were not applicable if a commuter authority intended to contract out a function rather than operate itself, it found no difference in the two situations, stating:

> From this perspective, we accept, at least *arguendo*, that as a general proposition, § 508(a)'s phrase "commuter authorities that intend to operate commuter service" must be read to include commuter authorities that proposed to transfer the operation of such service to a subcontractor. We say this because this disorder and adverse effects on Conrail would be of precisely the same character and magnitude whether a commuter authority operates its own service or makes use of an independent contractor to do so. Since Congress intended to prevent the harm in one situation we see no reason why it would not have done so in the other. Moreover § 508(a)'s requirement regarding the direct operation of commuter service by a commuter authority would serve little purpose if it could be put at naught by use of an independent contractor.
>
> 534 F. Supp. at 856.

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[1] On May 20, 1982, after the decisions in SEPTA I, SEPTA II, and SEPTA III, the Special Court, pursuant to Section 1152 of NERSA, asked the Judicial Panel on Multi-district Litigation to convene an 1152 Panel, which decided the case at bar. *See*, Rule 4, Rules of Special Court, 3R Act (App. 26a).

But the general panel in *SEPTA II* found that the statutory definition of "commuter service" did not provide much guidance with regard to the functions there involved, grass cutting and janitorial service. 534 F. Supp. at 856. Therefore, the Court found it necessary to construe and judicially gloss the statute with discernable standards that would provide some guidance for the future stating:

> Even assuming the foregoing, SEPTA's actions in the present case do not fall within the statute's terms. As noted above, NRSA's labor transfer provisions were designed to deal with a particular event—the transfer of Conrail's commuter operations to other entities. The perceived danger that this entailed was the massive dislocation of Conrail employees and the consequent disruption of Conrail's workforce. In the present case SEPTA is contracting for only a small part of the commuter service operations in the Philadelphia area, and the effect on Conrail will be minimal. Far more important, there are overwhelmingly reliable indications that SEPTA is not attempting to accomplish by degrees that which we think it may not do all at once. These indications are the discussions between SEPTA and Conrail in early January of 1981 regarding the desirability of contracting out for janitorial and grass-cutting services and the preparation of bid specifications and so forth by SEPTA in the spring of 1981—all well before NRSA was enacted. These events are important to our conclusion in two separate respects.
>
> First, they bear on whether SEPTA's conduct is within the range of actions by commuter authorities that § 508 was intended to regulate. As noted above, NRSA's labor transfer provisions were meant to deal with an unusual event, namely, the large-scale transfer of commuter operations from Conrail to other entities. Plainly, that is not the situation in this case. The pre-NRSA conduct of SEPTA and Conrail in-

dicates that contracting out for janitorial and grass-cutting services was merely one of the routine changes in the manner in which commuter service is provided to Philadelphia of the type those entities frequently had made. Moreover, it does not pose the danger to Conrail that inheres in the transfer of entire commuter service operations. If Conrail was satisfied that SEPTA's contracting out for janitorial and grass-cutting services would not adversely affect it, we do not think Congress would have perceived that such changes posed a threat to Conrail. In short, the character of the change in service sought by SEPTA and the pre-NRSA recommendations, discussions, and preparatory work indicate that the situation we face is not what concerned Congress when it enacted § 508.

The pre-NRSA actions of SEPTA and Conrail are important for another reason, namely, their bearing on SEPTA's intent, an issue that § 508(a), which predicates the labor transfer negotiating process on a commuter authority's "inten[t]" to operate commuter service, requires us to consider. Here, the pre-NRSA actions of SEPTA and Conrail clearly indicate that SEPTA is not attempting to circumvent the provisions of NRSA; rather, it is merely carrying out plans, approved by Conrail, that have been underway since before NRSA's enactment. To repeat the point made earlier, what SEPTA intends by the arrangement with Fernandez is not to "operate commuter service" but to continue its historic pattern of making minor adjustments in the way commuter service is provided in Philadelphia.

We need not decide precisely what factual showing by a commuter authority will satisfy the foregoing interpretation of § 508. This case involves very clear evidence of SEPTA's intent merely to make small-scale adjustments, consistent with historic practices, in the way commuter service is provided in Philadelphia, rather than to engage in the type of transfer

> envisioned by § 508. We will decide subcontract cases lacking evidence of pre-NRSA preparations and consent by Conrail or involving more substantial portions of Conrail's commuter operations, when and if they arise . . . 534 F. Supp. 856-57.

Both the General Panel in *SEPTA III* and the § 1152 Panel in the case at bar used the criteria set forth in *SEPTA II* to determine if the functions therein to be contracted out by SEPTA or assumed by it directly were subject to the labor transfer provisions of NERSA. And even though RLEA feels that the standards were incorrectly applied in the case at bar, the gravamen of its petition herein is that the only reason the considerations and criteria set forth above in the extensive quotation from *SEPTA II* were at all necessary was because the statutory definition of "commuter service" was of no aid with regard to any of the functions contained *SEPTA II* or *SEPTA III*, since none of them were referred to directly or indirectly in said definition. RLEA's point here is that the sale of commutation tickets was explicitly referred to in the statutory definition of "commuter service." And it is clear beyond peradventure of doubt in the explicit language of § 508(a) and in the General Panel's opinion in *SEPTA I* that a "commuter authority" that intends to operate "commuter service" is fully subject to the labor transfer provisions of NERSA, whether it intends to accomplish such commuter service itself (*SEPTA I*) or by means of a contractor (*SEPTA II*). The failure of the Special Court to have addressed this issue at all even though raised, effectively renders the statutory definition of "commuter service" nugatory. That cannot be permitted if the Congress is to legislate toward the ends it selects free from unwarranted judicial interpretation of statutory language.

CONCLUSION

The decision below is in direct conflict with decisions of this Court regarding the cardinal principle of statutory construction that plain and unambiguous statutory language must be given effect. It concerns the fundamental question of the freedom of the Congress to state what it means free from judicial interference. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Special Court.

Respectfully submitted,

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Date: October 18, 1982

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APPENDIX A

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

§ 1152 Panel
C.A. No. 82-18

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
Defendant,

and

CONSOLIDATED RAIL CORPORATION, and AMTRAK COMMUTER SERVICES CORPORATION d/b/a COMMUTER SERVICES CORPORATION,
Rule 19 Parties.

FILED
SEP 28 1982 p.m.
JAMES F. DAVEY, Clerk

Before GASCH, Presiding Judge, and BRYANT and WEINER, Judges.

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Lewis H. Van Dusen, Jr., Esq. and Robert H. Young, Jr., Esq. (Drinker Biddle & Reath, Philadelphia, PA), for Defendant Southeastern Pennsylvania Transportation Authority

Harry A. Rissetto, Esq. and John A. Fraser, III, Esq. (Morgan Lewis & Bockius, Washington, D.C.), and Hermon M. Wells, Esq. (Consolidated Rail Corporation, Philadelphia, PA), for Rule 19 Party Consolidated Rail Corporation

Seymour Kurland, Esq. and Mark L. Alderman, Esq. (Wolf, Block, Schou, & Solis-Cohen, Philadelphia, PA), for Rule 19 Party Amtrak Commuter Services Corporation

WEINER, Judge:

I.

This is the fourth in a series of cases involving application of §§ 508 and 510 of the Rail Passenger Service Act (RPSA) added by § 1145 of the Northeast Rail Service Act of 1981 (NRSA) to actions taken or proposed to be taken by Southeastern Pennsylvania Transportation Authority (SEPTA) concerning commuter rail service in the southeastern Pennsylvania region. That commuter rail service is currently being supplied to SEPTA by Consolidated Rail Corporation (Conrail) on a contractual basis pursuant to § 304 of the Regional Rail Reorganization Act of 1973 (RRRA). The three previous cases are *Railway Labor Executives' Association* v. *Southeastern Pennsylvania Transportation Authority* (SEPTA I), 534 F. Supp. 832 (Jan. 27, 1982), cert. denied, ___ U.S. ___, 102 S.Ct. 2271, 73 L. Ed. 2d 1285 (May 24, 1982), *Railway Labor Executives' Association* v. *Southeastern Pennsylvania Transportation Authority* (SEPTA II), 534 F. Supp. 852 (March 11, 1982), and *International Brotherhood of Teamsters* v. *Southeastern Pennsylvania Transportation Authority* (SEPTA III), 539 F. Supp. 1222 (May 21, 1982). Since we must apply those precedents to the case now before us, familiarity with those opinions is necessary and will be assumed.

The identity of plaintiff Railway Labor Executives' Association (RLEA), defendants SEPTA and Conrail and the relations between them have been fully described in Presiding Judge Friendly's opinion in *SEPTA I*, *supra*, 534 F. Supp. at 834-35. A new party, Amtrak Commuter Services Corporation, (Commuter) which does business as Commuter Services Corporation has been named as a Rule 19 party in the complaint.[1] Commuter was established by § 501 of RPSA, as

[1] Rule 19 of the Federal Rules of Civil Procedure provides for "joinder of persons needed for just adjudication."

added by § 1137 of NRSA, to operate commuter service on behalf of those commuter authorities which contract with it to provide such service. Commuter's involvement in this action stems from SEPTA's March 29, 1982, notification to Commuter and Conrail that pursuant to § 506(a) of RPSA, as added by § 1137 of NRSA, it intends to contract with Commuter for the operation of commuter rail service in the southeastern Pennsylvania region.[2]

In this case, as in each of the three previous cases, the complaint alleges that SEPTA's acts or proposed acts violate §§ 508 and 510 and will result in irreparable loss of the rights of Conrail employees under NRSA. The particular act which plaintiff complains of is SEPTA's announced intention to assume performing through a contractor the ticket selling functions currently being provided by Conrail and Conrail employees represented by the Brotherhood of Railway, Airline and Steamship Clerks, a constituent member of RLEA.[3]

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[2] By letter of David F. Girard-diCarlo, Chairman of The Board of SEPTA, to David W. Marston, President and Chairman of the Board of Amtrak Commuter Services Corporation, dated March 29, 1982, SEPTA served notice on Commuter that SEPTA intends to contract with Commuter for the operation of commuter rail services in accordance with § 506(a) of RPSA.

[3] In his letter of April 12, 1982, David L. Gunn, Chief Operations Officer/General Manager of SEPTA advised Conrail that effective August 1, 1982, SEPTA intended to begin performing by contractor ticket sales functions currently provided by Conrail and Conrail employees. Exhibit B to the complaint. The August 1, 1982, date for takeover of the ticket selling function was subsequently changed. A letter from David L. Gunn to R. P. Huffman, Conrail's Regional Manager Passenger Services for the SEPTA Region, dated July 19, 1982, requested that Conrail continue its ticket selling activities until September 1, 1982. In a letter of August 24, 1982, John A. Fraser, counsel for Conrail, informed the Court that takeover of the ticket selling function by SEPTA had been further delayed to October 1, 1982.

The complaint further alleges that the selling of tickets constitutes "commuter service" as defined in § 1135(a)(4) of NRSA. The relief prayed for is a declaration that SEPTA or Commuter pursuant to § 508 must negotiate and arbitrate, if necessary, an implementing agreement with Conrail and the labor organizations representing the employees performing the ticket selling function prior to SEPTA's or Commuter's operation of "commuter service" and a similar declaration with respect to the § 510 collective bargaining negotiations along with injunctive relief prohibiting SEPTA from contracting out the ticket selling function without first complying with §§ 508 and 510.[4]

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[4] The full text of §§ 508 and 510 is as follows:

SEC. 508. TRANSFER OF EMPLOYEES.

(a) Not later than May 1, 1982, Conrail, commuter authorities that intend to operate commuter service, and representatives of the various crafts or classes of employees of Conrail to be transferred to the commuter authorities shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.

(b) Not later than May 1, 1982, Conrail, Amtrak Commuter, and representatives of the various crafts or classes of employees of Conrail to be transferred to Amtrak Commuter shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.

(c) Such negotiations shall—

(1) determine the number of employees to be transferred to Amtrak Commuter or a commuter authority;

(2) identify the specific employees of Conrail to whom Amtrak Commuter or a commuter authority offers employment;

(3) determine the procedure by such employees may elect to accept employment with Amtrak Commuter or a commuter authority;

(4) determine the procedure for acceptance of such employees into employment with Amtrak Commuter or a commuter authority;

(5) determine the procedure for determining the seniority of such employees in their respective crafts or classes in Amtrak

SEPTA's answer asserts that its assumption of the ticket selling function falls within the exceptions outlined in *SEPTA II* and *SEPTA III*, and further, that it is not governed by

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Commuter or with a commuter authority which shall, to the extent possible, preserve their prior seniority rights;

(6) ensure that all such employees are transferred to Amtrak Commuter or a commuter authority no later than January 1, 1983; and

(7) ensure the retention of prior seniority on Conrail of employees transferring to Amtrak Commuter or a commuter authority and determine the extent and manner in which such employees shall be permitted to exercise such seniority in order to (A) provide employees transferred to Amtrak Commuter or a commuter authority at least one opportunity every six-month period to exercise previous freight seniority rights, (B) maximize employment opportunities for employees on furlough, (C) maintain the ability to recall experienced employees, (D) ensure that under no circumstances are seniority rights exercised in any manner which results in an interruption of service or a position being filled which would otherwise not be filled under the terms of any crew consist, fireman manning, or other similar agreement, and (E) ensure that Conrail has the right to furlough one employee in the same craft or class for each employee who returns from Amtrak Commuter or a commuter authority by exercising seniority.

(d)(1) If agreements with respect to the matters being negotiated pursuant to this section are not reached by August 1, 1982, the parties to the negotiations shall, within an additional 5 days, select a neutral referee. If the parties are unable to agree upon the selection of such a referee, the National Mediation Board shall immediately appoint a referee.

(2) The referee shall commence hearings on the matters being negotiated pursuant to this section not later than 5 days after the date he is selected or appointed, and shall render a decision within 20 days after the date of commencement of such hearings. All parties may participate in the hearings, but the referee shall have the only vote.

(3) The referee shall resolve and decide all matters in dispute with respect to the negotiation of the implementing agreement or agreements. The referee's decision shall be final and binding to the same extent as an award of an adjustment board under section 3 of the Railway Labor Act, and shall constitute the implementing agreement or agreements between the parties.

§§ 508 and 510 because it has served notice that it intends to contract with Commuter for the operation of its commuter rail lines and it is not a commuter authority that intends to operate

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The National Mediation Board shall fix and pay the compensation of such referees.

(e)If Amtrak Commuter transfers commuter service and properties to a commuter authority under section 506 of this title, Amtrak Commuter, the commuter authority, and representatives of the various crafts or classes of employees to be transferred to the commuter authority shall enter into an implementing agreement in accordance with subsection (c) of this section. If no agreement is reached by the date service and properties are transferred, the dispute shall be resolved by a neutral referee in accordance with subsection (d) of this section.

(f) Any employee of Conrail who is not offered employment with Amtrak Commuter or a commuter authority under agreements entered into under this section shall be provided employee protection under section 701 of the Regional Rail Reorganization Act of 1973 to the same extent as if such employee had remained in the employ of Conrail.

SEC. 510. COLLECTIVE BARGAINING AGREEMENT FOR AMTRAK COMMUTER OR COMMUTER AUTHORITIES

(a)(1) Not later than September 1, 1982, the commuter authorities that intend to operate commuter service and the representatives of the various classes or crafts of employees to be transferred to such commuter authorities under agreements entered into under section 508 of this Act shall enter into new collective bargaining agreements with respect to rates of pay, rules, and working conditions.

(2) Not later than September 1, 1982, Amtrak Commuter and the representatives of the various classes or crafts of employees to be transferred to Amtrak Commuter under agreements entered into under section 508 of this Act shall enter into new collective bargaining agreements with respect to rates of pay, rules, and working conditions.

(b) If the parties have not reached an agreement by the date specified in subsection (a) of this section, any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may, within 15 days after such date, request the President to establish an emergency board pursuant to subsection (c) of this section.

(c) Within 15 days after the request under subsection (b) of this section, of a party or a Governor, the President shall create

commuter service within the meaning of that term in §§ 508(a) and 510(a)(1).

Procedurally this matter is before us on RLEA's motion for a preliminary injunction which was filed on June 15, 1982. That motion requested that the Court establish a schedule for filing of a stipulation of facts and briefs and for hearing oral argument. We did so in an order dated June 17, 1982. The parties filed their stipulation of facts on June 28, 1982.[5] All pertinent

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an emergency board. Such board shall conduct a public hearing on the dispute at which each party shall appear and provide testimony, and shall, within 30 days after the date of its creation, report on the dispute.

(d) If no settlement in the dispute is reached within 10 days after the report of the emergency board, such board shall require the parties to the dispute to submit, within 5 days, final offers to the board for settlement of the dispute.

(e) Within 15 days after the submission of final offers, the emergency board shall submit a report of the President setting forth its selection of the most reasonable offer.

(f) If the emergency board selects a final offer submitted by a carrier and the employees of such carrier engage in any work stoppage arising out of the dispute, such employees shall not be eligible during the period of such work stoppage for benefits under the Railroad Unemployment Insurance Act.

(g) If the emergency board selects a final offer submitted by the employees and the carrier refuses to accept such offer, the carrier shall not participate in any benefits of any agreement between carriers which is designed to provide benefits to such carriers during a work stoppage.

(h) The provisions set forth in this section shall be the exclusive means for resolving any dispute relating to entering into an initial collective bargaining agreement between Amtrak Commuter or a commuter authority, as the case may be, and representatives of the various classes or crafts of employees to be transferred to Amtrak Commuter or such commuter authority."

[5] The stipulation of facts prepared for this case has been supplemented by incorporation of the Stipulation of Facts, Appendix to Stipulation of Facts and Supplemental Stipulation filed in *SEPTA I*, and the Stipulation of Facts filed in *SEPTA III*.

facts were not agreed to, however, and Conrail requested that the Court schedule an evidentiary hearing before the writer. That hearing was held on July 1, 1982. SEPTA and Conrail have also filed certain affidavits to complete the evidentiary record. At oral argument on July 16, 1982, the Court informed the parties that in accordance with Rule 65(a)(1) F.R.Civ.P., trial on the merits would be advanced and consolidated with the hearing on the motion for preliminary injunction.

II

The background of Conrail's operation of commuter service for SEPTA has been set forth in the Court's opinions in *SEPTA I*, 534 F. Supp. 834-35, and *SEPTA II*, 534 F. Supp. at 853-54. The factual background giving rise to this action began when SEPTA identified certain areas it wished to remove from subsidy operation by Conrail; among those areas was the elimination of ticket selling by Conrail. At the evidentiary hearing David L. Gunn, Chief Operations Officer and General Manager of SEPTA, testified that in November, 1980 he met with Richard Sullivan, Conrail's Vice-President of Passenger Service, and discussed ways for SEPTA to cut costs and thereby reduce its subsidy to Conrail. Included in those discussions was a general reference to SEPTA's assuming responsibility or subcontracting for the performance of various functions. On January 30, 1981, another meeting was held between representatives of Conrail and SEPTA to discuss means by which SEPTA could reduce costs. Mr. Gunn's notes of that meeting list five functions which he mentioned to Conrail that SEPTA could take over. These functions were: station cleaning, car cleaning, ticket selling, security, and operation of the Newtown-Fox Chase line. A Conrail witness at the hearing, Donald A. Brinkworth, did not dispute that these functions were discussed, but he maintained that the discussions were very general and Conrail had not agreed at those meetings to a takeover of the ticket selling function by SEPTA. On June 3, 1981, another meeting was held to find ways to reduce costs. At that meeting Conrail proposed that $1.5 million could be saved by a major elimination of ticket selling.

Sometime during June, George W. Miller, Treasurer of SEPTA, directed a member of his staff, Barbara Titus, to begin developing plans for the contracting out of the ticket selling functions. A draft request for proposal for the services of a consultant was prepared on June 15, 1981. Subsequently Mrs. Titus spoke to Conrail representatives and requested information regarding ticket selling in the Reading Division.[6] At about the same time SEPTA began plans to assume operating responsibility for the Reading Division. That opertion was scheduled to commence on January 1, 1982.[7] Conrail interpreted Mrs. Titus' requests for information as relating to the larger takeover of rail operations on the Reading Division rather than relating to a more limited takeover of ticket sales.

In any event, SEPTA continued its efforts to prepare for the contracting out of ticket sales. In December, 1981 SEPTA advertised a notice for a request for proposal by contractors. Since February, 1982 SEPTA has engaged in negotiations with one contractor, Blue Ribbon Services, Inc., which has submitted a proposal. This preparation led to SEPTA's April 12, 1982 notification to Conrail that it intended to perform the ticket sales function on the Reading Division on August 1, 1982, and to assume responsibility for the balance of the ticket sales at a later date.

If SEPTA proceeds with this plan, Conrail will abolish 56 positions on the Reading Division and 76 positions on the former Penn Central lines. In all 139 Conrail employees will be effected and 132 positions will be eliminated.

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[6] Conrail's commuter operations in Philadelphia were divided into the Reading Division for lines running out of Reading Terminal which were formerly operated by the Reading Railroad and the Philadelphia Division for lines formerly operated by Penn Central.

[7] Letter of David L. Gunn to Richard C. Sullivan dated August 11, 1981. Conrail Exhibit 4 attached to the transcript of the July 1, 1982 evidentiary hearing.

III

We must now decide whether this case should be governed by the holding in *SEPTA I* or whether it fits within the exceptions outlined in the decisions in *SEPTA II* and *SEPTA III*. After an exhaustive examination of the RPSA amendments and their legislative history, Judge Friendly held in *SEPTA I* that SEPTA could not lawfully assume operation of commuter service on a line previously operated by Conrail without complying with the procedures of §§ 508 and 510.

When presented with SEPTA's attempt to subcontract for the station cleaning function in *SEPTA II*, the Court framed the issue as

> whether §§ 508 and 510 of RPSA are applicable in a situation where a commuter authority seeks to complete the process of making a small-scale adjustment in the manner in which commuter service is provided when substantial steps towards making this adjustment had been taken prior to the effective date of NRSA. 534 F. Supp. at 855.

In deciding that issue the Court looked to the purposes underlying NRSA's labor transfer amendments to RPSA. Judge Friendly found "[t]he labor transfer provisions were an attempt to deal with the disruptions thought likely to accompany the large scale transfer of commuter services from Conrail to other entities". 534 F. Supp. at 856. The disruptive effect on Conrail of SEPTA's contracting out of the performance of janitorial and grass-cutting services was considered minimal.[8]

The Court considered at some length and gave weight to steps taken prior to the passage of NRSA by SEPTA and Conrail. These pre-NRSA preparations indicated that SEPTA's decision to subcontract for the performance of janitorial

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[8] Thirty-two full time Conrail employees were affected by SEPTA actions in *SEPTA II*. Affidavit of Richard Sullivan ¶ 5, filed in *SEPTA II*.

and grass cutting services "was merely one of the routine changes in the manner in which commuter service is provided to Philadelphia of the type those entities frequently had made." 534 F. Supp. at 857. The pre-NRSA discussions and preparations were important for two reasons. "First, they bear on whether SEPTA's conduct is within the range of actions by commuter authorities that § 508 was intended to regulate." *Id.* Second, the pre-NRSA actions of SEPTA and Conrail bear on the question of whether SEPTA intends to operate commuter service, either itself or through a subcontractor. Application of the §§ 508 and 510 provisions is predicated on such an intent to operate commuter service. In *SEPTA II* the Court found the pre-NRSA preparations suggested that SEPTA was not seeking to circumvent the statute by accomplishing by degrees what the decisions in *SEPTA I* prohibited it from doing all at once. The Court did not decide what factual showing by a commuter authority would satisfy the *SEPTA II* exception. It did, however, state "[w]e will decide subcontract cases lacking evidence of pre-NRSA preparations and consent by Conrail or involving more substantial portions of Conrail's commuter operations . . . when and if they arise". *Id.* Such questions have come before the Court in *SEPTA III* and now in this action.

The Court found *SEPTA III* "exceedingly close to *SEPTA II*", 539 F. Supp. 1224. Although SEPTA's pre-NRSA preparations for performing security service with its own employees were not as substantial as those demonstrated in *SEPTA II*, the Court found that they did satisfy the standards articulated in the prior case. Taken together with the small number of employees involved[9] the pre-NRSA preparations indicated to the Court that SEPTA's proposed "change was merely part of the 'historic pattern of making minor adjust-

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[9] The positions of fourteen Conrail policemen were at stake in *SEPTA III*. *SEPTA III*, Stipulation of facts, ¶¶ 15-16.

ments in the way commuter service is provided in Philadelphia', 534 F. Supp. at 857, which we do not think Congress meant to prohibit when it enacted NRSA." 537 F. Supp. at 1225.

From the brief factual recital in part II of this opinion, it is apparent that the facts of this case are not as close to *SEPTA II* as Judge Friendly found the facts of *SEPTA III* to be. Both sides ask us to evaluate the pre-NRSA discussions and preparations in the light of the standards developed in *SEPTA II*. Conrail asserts, and RLEA agrees, that those standards have not been met because the pre-NRSA discussions were too general and tentative to demonstrate that Conrail did approve an assumption by SEPTA of the ticket selling function prior to the effective date of NRSA. SEPTA asserts that such approval should be inferred from the various meetings where the subject of reduction of costs through the elimination of Conrail's performance of various functions was discussed. From the evidence presented and testimony heard it does not appear to us that the evidence supports a finding that Conrail approved SEPTA's takeover of the ticket selling function. What is clear to us is that SEPTA formed an intent in January, 1981 to assume the ticket selling function at some future date, and it appears that Conrail first fully appreciated SEPTA's intention to take over the ticket selling function in the summer of 1981, when the disucssions were being held regarding SEPTA's takeover of the operation of the entire Reading Division.

We are not convinced, however, that approval by Conrail is a prerequisite for application of the *SEPTA II* standards. The consent of Conrail to SEPTA's takeover of the station cleaning and security service in *SEPTA II* and *SEPTA III*, merely buttressed the otherwise available evidence that such changes in service were those contemplated and permitted by paragraph 2(f) of the May 23, 1981 agreement between SEPTA and

Conrail.[10] SEPTA's making any change permitted by ¶ 2(f) is not contingent on approval by Conrail. Prior to August 13, 1981, the effective date of NRSA, the relations between SEPTA and Conrail were governed solely by § 304 of RRRA and the various agreements between them.

We must now face the question of whether the pre-NRSA discussions and preparations are sufficient to meet the test articulated in *SEPTA II*. We find that they are. The evidence presented to us indicates that the pre-NRSA discussions between SEPTA and Conrail were no more or no less concrete with regard to the ticket selling function than those same discussions were with regard to the janitorial and grass-cutting and security functions. The uncontroverted evidence shows that these three functions along with car cleaning and operation of the Newtown-Fox Chase Line were generally

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[10] Paragraph 2(f) provides as follows:

> (f) Conrail grants SEPTA the right to approve all cost and budgetary assumptions, including manpower levels, used in the budgeting process, except labor costs governed by safety considerations, statutes, agency rules or regulations, work rules and labor contracts. The preceding sentence is intended to increase and not to reduce SEPTA's control over the costs of the Service, and shall not be construed as a limitation upon any rights which SEPTA may have by statute or otherwise to control such costs. In the event that, during the budgetary negotiation process, the parties cannot agree on mutually acceptable staffing requirements, service standards and associated costs thereof for a particular type of activity involved in providing the Service, or in the event that Conrail is unable to provide any such work activity at a level acceptable to SEPTA with respect to cost and/or staffing levels, SEPTA shall be entitled to exercise, without limitation, the rights which it has under the Operating Agreement to assume responsibility for providing such activity on its own or by contracting with one or more other parties. Upon the exercise of such right by SEPTA, the Operating Agreement shall be adjusted accordingly. SEPTA shall pay Conrail any reasonable transition costs related to such a transfer of responsibility, excluding "Title V" protection costs and liabilities, and shall be responsible for any "Section 13(c)" protection claims arising out of any agreements executed by SEPTA.

discussed in both January and June of 1981. These discussions along with the pre-NRSA preparations by SEPTA were held sufficient in *SEPTA II* and *SEPTA III* and we think they are sufficient here as well. SEPTA's pre-NRSA preparations, while not very extensive, do demonstrate that the ground work had begun to contract out the ticket selling function in June and July of 1981. They also demonstrate that SEPTA's intent was to change its relationship with Conrail in a manner which it thought consistent with the May 28, 1981 Agreement between it and Conrail. We find no evidence to suggest that SEPTA's takeover of responsibility for ticket selling through a subcontractor would have been contrary to ¶ 2(f) of the agreement.

That does not, however, end our inquiry. In both *SEPTA II* and *SEPTA III* the Court characterized the change sought by SEPTA as fitting into the "historic pattern of making minor adjustments in the way commuter service is provided in Philadelphia." 534 F. Supp. at 857. We must address the question of the magnitude of the change sought by SEPTA. If SEPTA completes its proposal to take over the ticket selling function, 132 positions will be abolished by Conrail. These 132 positions are approximately eight percent of a total work force of 1709 employed by Conrail for its SEPTA operations, as contrasted with the comparatively small number of Conrail positions eliminated after SEPTA's changes permitted by the decisions in *SEPTA II* (32), and *SEPTA III* (14). While the number of employees adversely affected alone should not be determinative, the disruptive effect on Conrail's operatrions in some ways is proportional to the number of employees displaced. The impact on Conrail's remaining workforce and its labor protection obligations imposed by Title VII of RRRA are dependent on the number of employees displaced. We nevertheless find that SEPTA's proposed takeover is merely one of the small scale adjustments made in the way commuter service is historically provided for Philadelphia. The transfer of the ticket selling functions from Conrail to SEPTA may be characterized as routine and minor, and although involving a larger

number of positions, is not substantially dissimilar to the changes approved in *SEPTA II* and *SEPTA III*. The magnitude of this proposed action by SEPTA is not so great that it stretches *SEPTA II* beyond its permissable limits and invokes the prohibition of *SEPTA I*.[11]

As in *SEPTA III* we need not decide the question whether SEPTA retains any obligation to negotiate under § 508(a) or to bargain under § 510(a)(1) in view of its March 29, 1982, notice to Commuter since we consider *SEPTA II* to be dispositive of this case.

Judgment will be entered denying the motion for a preliminary injunction and dismissing the complaint on the merits.

/s/ Oliver Gasch
Presiding Judge
OLIVER GASCH

/s/ William B. Bryant
Judge
WILLIAM B. BRYANT

/s/ Charles R. Weiner
Judge
CHARLES R. WEINER

DATED: September 23, 1982

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[11] With regard to the particular and distinct aspect of its operations, SEPTA seeks to do no more than was attempted in the actions which precipitated *SEPTA II* and *SEPTA III*. The common element in each instance is the relative insignificance of the proposed change when viewed against the background of SEPTA's overall commuter service operation. When seen in that context it becomes evident that the way in which commuter service is provided in Philadelphia will not be altered to any appreciable degree by this change in the ticket selling functions.

APPENDIX B

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

§ 1152 Panel
C.A. No. 82-18

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
Defendant,

and

CONSOLIDATED RAIL CORPORATION, and AMTRAK COMMUTER SERVICES CORPORATION d/b/a COMMUTER SERVICES CORPORATION,
Rule 19 Parties.

FILED
SEP 28 1982 p.m.
JAMES F. DAVEY, Clerk

JUDGMENT

This action having come on for hearing before the § 1152 Panel of the Court, and the issues having been duly heard, and the Court's opinion having been filed on September 23, 1982.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's motion for a preliminary injunction is denied and that the complaint is dismissed on its merits.

/s/ James F. Davey
JAMES F. DAVEY
Clerk

September 28, 1982

APPENDIX C

Portions Of Brief Of Plaintiff Railway Labor Executives' Association In *Railway Labor Executives' Association* v. *Southeastern Pennsylvania Transportation Authority*, Special Court, Regional Rail Reorganization Act Of 1973, Case No. 82-18 (SEPTA IV).

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

Civil Action No. 82-18

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
Defendant,

and

CONSOLIDATED RAIL CORPORATION,
and
AMTRAK COMMUTER SERVICES CORPORATION
d/b/a COMMUTER SERVICES CORPORATION,
Rule 19 Parties.

BRIEF OF PLAINTIFF
RAILWAY LABOR EXECUTIVES' ASSOCIATION

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Date: July 12, 1982

ARGUMENT

I. The Selling Of Commutation Tickets Constitutes "Commuter Service" As Defined In Section 1135(b)(1) Of NERSA, And Therefore Said Ticket Selling May Not Be Assumed By Either Commuter Or SEPTA Without Compliance With The Labor Transfer Provisions Contained In Section 1145 Of NERSA.

Section 1135(b)(1) of NERSA defines "commuter service" and states in pertinent part:

> 'Commuter service' means short-haul rail passenger service operated in metropolitan and suburban areas . . . usually characterized by *reduced fare, multiple-ride and commutation tickets*, and by morning and evening peak period operations. . . . (Emphasis added.)

Although the Court in *SEPTA II* noted that, in the factual background of that case, the statutory definition of "commuter service" was of no material assistance to the Court in making a determination as to whether SEPTA was required to comply with the labor transfer provisions of NERSA, the same cannot be said about this case, because the sale of reduced fare, multiple-ride and commutation tickets is an integral part of the definition of "commuter service." That being the case, the labor transfer provisions are applicable to any transfer of any such service operated by Conrail and performed by its employees for SEPTA on the effective date of NERSA (August 13, 1981).[4] Because ticket selling was being performed by Conrail

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[4] This Court in *SEPTA I* left no doubt that if an authority operated commuter service operated by Conrail on the effective date of NERSA, it was required to comply with the labor transfer provisions. The Court stated:

> "In the end we are confident that the statute means what RLEA and Conrail say . . . Congress left no real doubt that a commuter authority which was employing Conrail to render commuter service on the effective date of subtitle E could not operate that service on its own account or have Amtrak Commuter operate the service for it under adequate payment without propelling itself down the path described in Sections 508 and 510."

employees under an operating agreement existing pursuant to Section 304 of the 3R Act on the effective date of NERSA, and because ticket selling clearly is within the plain meaning of the statutory definition of commuter service, it necessarily follows that prior to the performance of any such service by Commuter or SEPTA, an implementing agreement must be reached or arbitrated within the statutorily defined period in the manner described in Section 508 of the RPSA Amendments (contained in Section 1145 of NERSA) and the parties must negotiate toward a collective-bargaining agreement in accordance with Section 510 of the RPSA.

APPENDIX D

Rail Passenger Service Act § 508, As Added By the Northeast Rail Service Act Of 1981, Subtitle E Of The Omnibus Budget Reconciliation Act Of 1981, Pub. L. 97-35, § 1145, 95 Stat. 669

"(a) Not later than May 1, 1982, Conrail, commuter authorities that intend to operate commuter service, and representatives of the various crafts or classes of employees of Conrail to be transferred to the commuter authorities shall enter into negotiations for an emplementing agreement in accordance with subsection (c) of this section.

"(b) Not later than May 1, 1982, Conrail, Amtrak Commuter, and representatives of the various crafts or classes of employees of Conrail to be transferred to Amtrak Commuter shall enter into negotiations for an implementing agreement in accordance with subsection (c) of this section.

"(c) Such negotiations shall—

"(1) determine the number of employees to be transferred to Amtrak Commuter or a commuter authority;

"(2) identify the specific employees of Conrail to whom Amtrak Commuter or a commuter authority offers employment;

"(3) determine the procedure by which such employees may elect to accept employment with Amtrak Commuter or a commuter authority;

"(4) determine the procedure for acceptance of such employees into employment with Amtrak Commuter or a commuter authority;

"(5) determine the procedure for determining the seniority of such employees in their respective crafts or classes in Amtrak Commuter or with a commuter authority which shall, to the extent possible, preserve their prior seniority rights;

"(6) ensure that all such employees are transferred to Amtrak Commuter or a commuter authority no later than January 1, 1983; and

"(7) ensure the retention of prior seniority on Conrail of employees transferring to Amtrak Commuter or a

commuter authority and determine the extent and manner in which such employees shall be permitted to exercise such seniority in order to (A) provide employees transferred to Amtrak Commuter or a commuter authority at least one opportunity every six-month period to exercise previous freight seniority rights, (B) maximize employment opportunities for employees on furlough, (C) maintain the ability to recall experienced employees, (D) ensure that under no circumstances are seniority rights exercised in any manner which results in any disruption of service or a position being filled which would otherwise not be filled under the terms of any crew consist, fireman manning, or other similar agreement, and (E) ensure that Conrail has the right to furlough one employee in the same craft or class for each employee who returns from Amtrak Commuter or a commuter authority by exercising seniority.

"(d)(1) If agreements with respect to the matters being negotiated pursuant to this section are not reached by August 1, 1982, the parties to the negotiations shall, within an additional 5 days, select a neutral referee. If the parties are unable to agree upon the selection of such a referee, the National Mediation Board shall immediately appoint a referee.

"(2) The referee shall commence hearings on the matters being negotiated pursuant to this section not later than 5 days after the date he is selected or appointed, and shall render a decision within 20 days after the date of commencement of such hearings. All parties may participate in the hearings, but the referee shall have the only vote.

"(3) The referee shall resolve and decide all matters in dispute with respect to the negotiation of the implementing agreement or agreements. The referee's decision shall be final and binding to the same extent as an award of an adjustment board under section 3 of the Railway Labor Act, and shall constitute the implementing agreement or agreements between the parties. The National Mediation Board shall fix and pay the compensation of such referees.

"(e) If Amtrak Commuter transfers commuter service and properties to a commuter authority under section 506 of this title, Amtrak Commuter, the commuter authority, and representatives of the various crafts or classes of

employees to be transferred to the commuter authority shall enter into an implementing agreement in accordance with subsection (c) of this section. If no agreement is reached by the date service and properties are transferred, the dispute shall be resolved by a neutral referee in accordance with subsection (d) of this section.

"(f) Any employee of Conrail who is not offered employment with Amtrak Commuter or a commuter authority under agreements entered into under this section shall be provided employee protection under section 701 of the Regional Rail Reorganization Act of 1973 to the same extent as if such employee had remained in the employ of Conrail.

APPENDIX E

Regional Rail Reorganization Act Of 1973 § 102(4), As Added By Subtitle E Of the Omnibus Budget Reconciliation Act Of 1981, Pub. L. 97-35, § 1135, 95 Stat. 646

"(4) 'Commuter service' means short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets, and by morning and evening peak period operations";

APPENDIX F

Northeast Rail Service Act Of 1981 § 1152, Subtitle E Of The Omnibus Budget Reconciliation Act Of 1981, Pub. L. 97-35, 95 Stat. 676

SEC. 1152. (a) Notwithstanding any other provision of law, the special court shall have original and exclusive jurisdiction over any civil action—

(1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or interpretation of any provision of or amendment made by this subtitle, or administrative action taken thereunder to the extent such action is subject to judicial review;

(2) challenging the constitutionality of any provision of or amendment made by this subtitle;

(3) to obtain, inspect, copy, or review any document in the possession or control of the Secretary, Conrail, the United States Railway Association, or Amtrak that would be discoverable in litigation under any provision of or amendment made by this substitle; or

(4) seeking judgment upon any claim against the United States founded upon the Constitution and resulting from the operation of any provision of or amendment made by this subtitle.

(b) A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this subtitle shall be reviewable by direct appeal to the Supreme Court of the United States. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment.

(c) Administrative action under the provisions of or amendments made by this subtitle which is subject to review shall be upheld unless such action is found to be unlawful under standards established for review of informal agency action under paragraphs (2)(A), (B), (C), and (D) of section 706, title 5, United States Code. The requirements of this subtitle shall constitute the exclusive

procedures required by law for such administrative action.

(d) If the volume of civil actions under subsection (a) of this section so requires, the United States Railway Association shall apply to the judicial panel on multidistrict litigation authorized by section 1407 of title 28, United States Code, for the assignment of additional judges to the special court. Within 30 days after the date of such application, the panel shall assign to the special court such additional judges as may be necessary to exercise the jurisdiction described in subsection (a) of this section.

APPENDIX G

Rule 4, Revised Rules Of The Special Court Under § 209 Of The Regional Rail Reorganization Act Of 1973, As Amended May 20, 1982

Rule 4

PANELS OF THE COURT

A. Two Panels. The Court shall consist of two panels of three judges to be known as the General Panel and the § 1152 Panel. The General Panel consists of the judges appointed from time to time by the Judicial Panel on Multidistrict Litigation under § 209(b) of the Regional Rail Reorganization Act of 1973 (the Act). The § 1152 Panel consists of the judges appointed from time to time by the Judicial Panel on Multidistrict Litigation under § 1152(d) of the Northeast Rail Service Act of 1981 (NRSA).

B. Presiding Judges. Each panel shall appoint one of its members as its Presiding Judge. The Presiding Judge of the General Panel shall be the Presiding Judge of the Court.

C. The General Panel. The General Panel shall have exclusive jurisdiction over all actions described in § 209(e), over proceedings under §§ 303 and 306(c)(4), and over supplemental transactions proposed under § 305 of the Act.

D. The § 1152 Panel. The § 1152 Panel shall have primary responsibility for all actions arising under § 1152(a) of NRSA. If the Presiding Judge of the § 1152 Panel so requests, one or more of the judges of the General Panel may (but shall not be required to) sit in a particular action under § 1152(a) of NRSA in the place and stead of the same number of judges of the § 1152 Panel. Any such request shall be made to the Presiding Judge of the General Panel or, in the event of his unavailability, to on of the other judges of the General Panel in order of precedence.

Office - Supreme Court, U.S.
FILED
NOV 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-711

IN THE

Supreme Court of the United States

October Term, 1982

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973

RESPONDENT SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 82-711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

RESPONDENT SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. COUNTER-STATEMENT OF THE CASE

On or about June 10, 1982, the Railway Labor Executives' Association (hereinafter "RLEA") filed a Complaint with the Special Court, Regional Rail Reorganization Act of 1973 (hereinafter "Special Court") seeking, among other things, a preliminary and permanent injunction en-

joining the Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA") from contracting out commuter rail ticket-selling operations in the Philadelphia metropolitan area. Pursuant to an Operating Agreement between SEPTA and Consolidated Rail Corporation (hereinafter "Conrail"), this work was performed by employees of Conrail who are represented by a labor organization which is a member of RLEA. The Complaint alleged that SEPTA was prohibited from contracting out this work without first complying with the provisions of Sections 508 and 510 of the Rail Passenger Service Act (hereinafter "RPSA"), 45 U. S. C. §§ 588, 590, as added by Section 1145 of the Northeast Rail Service Act of 1981 (hereinafter "NERSA"), Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, P. L. 97-35, 95 Stat. 357.

The case was argued before the Special Court, Regional Rail Reorganization Act of 1973, on July 16, 1982. The Special Court, in a unanimous Opinion dated September 23, 1982, denied RLEA's motion for a preliminary injunction and dismissed the Complaint on the merits. Specifically, the Court held:

> "We nevertheless find that SEPTA's proposed takeover [of responsibility for ticket selling] is merely one of the small scale adjustments made in the way commuter service is historically provided for Philadelphia. The transfer of the ticket selling functions from Conrail to SEPTA may be characterized as routine and minor, and although involving a larger number of positions, is not substantially dissimilar to the changes approved in *SEPTA II* [*Railway Labor Executives' Association v. Southeastern Pennsylvania Transportation Authority*, 534 F. Supp. 852 (Sp. Ct. RRRA 1982)] and *SEPTA III* [*International Brotherhood of*

Teamsters, Local 732, IBT v. Southeastern Pennsylvania Transportation Authority, 539 F. Supp. 1222 (Sp. Ct. RRRA 1982)].

Appendix, 14a.[1] Following the issuance of the Special Court's Opinion, SEPTA, on September 27, 1982, advised Conrail that Conrail's staff should discontinue their ticket selling activities at all Reading Division stations on November 1, 1982.

On October 15, 1982, RLEA filed with the Special Court a Motion to Stay Effect of Decision and for Reconsideration. The Special Court denied RLEA's Motion by Order dated October 22, 1982.[2] On October 18, 1982, RLEA filed the present Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973.

On October 29, 1982, RLEA filed an application to Chief Justice Warren E. Burger for a stay of the judgment of the Special Court. Chief Justice Burger denied the application on November 2, 1982. Two days later, RLEA renewed its application for a stay, this time addressing it to Justice William J. Brennan, Jr.

The Southeastern Pennsylvania Transportation Authority submits this Brief in opposition to RLEA's Petition for a Writ of Certiorari.

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1. Reference is to the Appendix submitted with RLEA's Petition for a Writ of Certiorari.

2. A copy of that Order is set forth in the Appendix attached to this Brief.

II. REASONS FOR DENYING THE WRIT

The Special Court Correctly Interpreted the Language and Intent of the Northeast Rail Service Act of 1981

Supreme Court Rule 17 provides that review on writ of certiorari will be granted "only when there are special and important reasons therefor." In its Petition for a Writ of Certiorari, RLEA sets forth no reason that could be characterized as "special" or "important".

RLEA's sole argument for the granting of certiorari is that the Special Court, according to RLEA, ignored the explicit language of NERSA and sat as a "super-legislature" creating statutory distinctions where none were intended. However, a review of the statutory language involved and of the decisions of the Special Court interpreting that language reveals that RLEA's arguments are without foundation.

In the first of a series of cases brought before the Special Court, RLEA argued that SEPTA could not take over *all* commuter rail operations on the Reading Division without complying with Sections 508 and 510 of RPSA, as added by Section 1145 of NERSA. *Railway Labor Executives' Association v. Southeastern Pennsylvania Transportation Authority*, 534 F. Supp. 832 (Sp. Ct. RRRA 1982), *cert. denied*, 102 S. Ct. 2271 (1982) (hereinafter "*SEPTA I*").[3] The Special Court agreed and the Supreme Court denied SEPTA's petition for a writ of certiorari. The Special Court did *not* hold, as alleged by RLEA in this case, that "any commuter service operated by Conrail on the effective date of NERSA (August 13, 1981) was subject to the labor transfer provisions of NERSA if a

3. Those sections require that "commuter authorities that intend to operate commuter service" negotiate implementing agreements with Conrail and the representatives of Conrail's employees to be transferred to the commuter authority and negotiate for collective bargaining agreements with those representatives.

commuter authority intended to operate the service on its own behalf." (Petition, 5)[4] Rather, the Court's decision in *SEPTA I*, as explained in *SEPTA II*, addressed only the consequences of a takeover of "the *entire* operation of commuter service on a line previously operated under contract by Conrail."[5] (emphasis added). The Court did not address the consequences of a takeover of an incidental, commuter-related function such as ticket selling.

In *SEPTA II*, the Special Court held that the labor transfer provisions of NERSA were designed to deal with the transfer of Conrail's commuter operations and the possible massive dislocation of Conrail employees and disruption of Conrail's workforce that this transfer could cause. Having held in *SEPTA I* that a commuter authority taking over the entire operation of commuter service was subject to Sections 508 and 510 of RPSA, the Court, in *SEPTA II*, accepted *arguendo* that the same was true of a commuter authority that intended to contract out the entire operation.[6] The Special Court went on to hold, however, that that was not the case before it. Rather, the issue in *SEPTA II* was

> "Whether §§ 508 and 510 of RPSA are applicable in a situation where a commuter authority seeks to complete the process of making a small-scale adjustment in the manner in which commuter service is provided when substantial steps towards making this adjust-

4. Reference is to RLEA's Petition for a Writ of Certiorari to the Special Court.

5. *Railway Labor Executives' Association v. Southeastern Pennsylvania Transportation Authority*, 534 F. Supp. 852, 855 (Sp. Ct. RRRA 1982). No petition for certiorari filed.

6. The Court did *not* hold, as RLEA's Petition suggests (Petition, 8), that its decision in *SEPTA I* applied to a commuter authority that contracted out "a function."

> ment had been taken prior to the effective date of NRSA."

534 F. Supp. at 855.

The Court looked to SEPTA's pre-NERSA preparations and discussions with Conrail and to the size of the function taken over not as a test in defining "commuter service", but rather as indications that SEPTA, in contracting out janitorial and grass cutting work, was merely making a minor adjustment in the way commuter service is provided in Philadelphia. The Court, in upholding SEPTA's right to contract out janitorial and grass-cutting work, made clear that it was not setting forth a test, each part of which had to be met, by stating, "We will decide subcontract cases lacking evidence of pre-NERSA preparations and consent by Conrail or involving more substantial portions of Conrail's commuter operations . . . when and if they arise." 534 F. Supp. at 857.

In *SEPTA III*,[7] the Special Court reached an identical result with respect to SEPTA's takeover of direct responsibility for security. The Court held that the number of employees involved together with the pre-NERSA actions of SEPTA and Conrail

> "strongly suggest that whatever harm Conrail and its employees may suffer is not comparable to the large-scale disruptions that the wholesale transfer of commuter operations was thought to entail."

539 F. Supp. at 1225.

In the present case, the Special Court, based on the precedent established in *SEPTA II* and *SEPTA III*, found that:

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7. *International Brotherhood of Teamsters Local 732, IBT v. Southeastern Pennsylvania Transportation Authority*, 539 F. Supp. 1222 (Sp. Ct. RRRA 1982). No petition for certiorari filed.

> "The pre-NERSA discussions between SEPTA and Conrail were no more or no less concrete with regard to the ticket selling functions than those same discussions were with regard to the janitorial and grass-cutting and security functions. The uncontroverted evidence shows that these three functions along with car cleaning and operation of the Newtown-Fox Chase Line were generally discussed in January and June of 1981."

Appendix, 13a. SEPTA's takeover of operations on the Newtown-Fox Chase Line, SEPTA's contracting out of janitorial and grass-cutting work, and SEPTA's assumption of responsibility for security were upheld by the Special Court in *SEPTA I*, *SEPTA II*, and *SEPTA III*. The Court's decision in the present case to uphold SEPTA's right to contract out ticket selling was entirely consistent with those earlier decisions.

RLEA argues that the present case is distinguishable from *SEPTA II* and *SEPTA III* and that certiorari is appropriate because "the sale of commutation tickets was explicitly referred to in the statutory definition of 'commuter service.'" (Petition, 11) The relevant language of NERSA quickly reveals the weakness of this argument.

Section 1135 of NERSA defines "commuter service" as "short-haul rail passenger service . . . usually characterized by reduced fare, multiple ride, and commutation tickets . . . ." Nowhere does the statute refer to the *selling* of tickets or state that an entity that sells commutation tickets is "operating commuter service." RLEA's argument, if accepted, would lead to the untenable conclusion that an organization which merely prints commutation tickets is operating commuter service. Furthermore, tickets can be sold just as easily by supermarkets and banks as by railroad ticket agents. Surely a super-

market selling commuter tickets is not operating commuter service.

In four separate cases, the Special Court has addressed the meaning of the phrase "commuter authorities that intend to operate commuter service." The Court consistently has determined that the takeover of minor, commuter rail related functions in accordance with pre-NERSA plans, does not evidence an intent to operate commuter service and does not trigger the provisions of Sections 508 and 510 of RPSA. The mere fact that the word "tickets" is mentioned in the definition of "commuter service" certainly does not require a different result.

Contrary to RLEA's assertions, the Special Court has not ignored the plain meaning of NERSA[8] nor has it acted as a super-legislature creating unwarranted statutory distinctions. Rather, consistent with the jurisdiction conferred on it by Section 1152 of NERSA, the Special Court has sought to interpret NERSA in a manner consistent with the intent of Congress. That intent was to "deal with the disruptions thought likely to accompany the large-scale transfer of commuter services from Conrail to other entities." *SEPTA II*, 534 F. Supp. at 856. The contracting out of ticket selling, in accordance with plans made by SEPTA before the passage of NERSA, will create no such disruptions and SEPTA's right to contract out this incidental function was properly upheld by the Special Court.

8. In *SEPTA II*, the Special Court correctly referred to NERSA as "an obscurely worded statute." *SEPTA II*, 534 F. Supp. at 856.

III. CONCLUSION

Petitioner RLEA has presented no compelling reason to justify the granting of certiorari in this case. Consequently, SEPTA respectfully urges that RLEA's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Dated: November 15, 1982

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

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§ 1152 Panel C. A. No. 82-18

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Defendant,

and

CONSOLIDATED RAIL CORPORATION, and
AMTRAK COMMUTER SERVICES CORPORATION
d/b/a COMMUTER SERVICES CORPORATION,
Rule 19 Parties.

ORDER DENYING MOTION OF RLEA FOR STAY OF DECISION AND FOR RECONSIDERATION

On October 15, 1982, the Railway Labor Executives' Association ("RLEA") filed a motion to stay the effect of the decision in the above captioned action and for reconsideration of that decision. Rule 18 of the Rules of the Court requires a petition for reconsideration to "state with particularity the points of law or fact which in the opinion of the petitioner the Court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present." RLEA has

not presented any arguments in support of its motion for reconsideration. Its memorandum in support of its motion refers in a footnote to one point which it contends the Court overlooked. That point is that the Court overlooked RLEA's claim that inclusion of the word "commutation tickets" in the statutory definition of "commuter service" as found in § 1135(a)(4) of NRSA requires Southeastern Pennsylvania Transportation Authority ("SEPTA") to comply with the provisions of § 1145 of NRSA before assuming the ticket selling function. While we did not specifically discuss this point in our opinion of September 23, 1982, we accepted *arguendo* RLEA's contention that the selling of tickets constitutes commuter service and we rejected the contention that small scale adjustments to the manner commuter service is provided may not be made without invoking the provisions of § 1145. *See* Opinion of September 23, 1982, pp. 7-12. We find nothing in the motion for reconsideration to cause us to revise our opinion.

Insofar as the motion asks the Court to enjoin SEPTA from performing the ticket selling function through the services of an independent contractor, RLEA seeks substantially more than a mere stay of our decision which dismissed the complaint and denied the motion for a preliminary injunction. In its motion RLEA seeks to obtain that preliminary injunction. This action has been adequately briefed and argued and RLEA's memorandum in support of this motion contains no additional points of law or facts which would require us now to grant the injunctive relief that we had previously denied. Accordingly,

It Is Ordered that the motion of RLEA for a stay and reconsideration of this Court's decision of September 23, 1982, and judgment of September 28, 1982 be, and the same is, hereby denied.

/s/ OLIVER GASCH
Oliver Gasch
Presiding Judge

/s/ WILLIAM B. BRYANT
William B. Bryant
Judge

/s/ CHARLES R. WEINER
Charles R. Weiner
Judge

DATED:

Oct. 22nd 1982